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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT L. GUMM, d/b/a DESERT-AIRE MOBILE HOME STYLING AND SALES, INC. AND BOB'S MOBILE HOME SALES,
*Petitioner,*

against

J. O. TURNER AND FERN LOUISE TURNER,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the court below erred in awarding a "double recovery," once under federal disclosure laws and once under state disclosure laws, for essentially the same wrongful conduct.

2. Whether the court below erred in refusing to give validity to the choice-of-law provision agreed to by Plaintiffs.

3. Whether the court below erred in imposing liability on Defendant as a creditor, as defined by 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s), without a proper finding that the Defendant was a creditor with respect to the specific transaction under consideration.

# TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | 1 |
| Table of Authorities | III |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 7 |
| I. The award of a "double recovery," damages under both federal consumer protection laws and state consumer protection laws, for a single act of misconduct is inconsistent with legislative intent and unnecessarily punitive, and presents an important federal question with significant impact on the extension of credit. | 7 |
| II. The Fifth Circuit erred by not considering whether to give effect to the contracted for choice-of-law provision, designating New Mexico law as controlling, and the District Court erred by refusing to give effect to the choice-of-law provision based on "where the contract was entered into" instead of where the contract was made. | 11 |
| III. The analysis employed by the courts below to impose liability on Defendant as a creditor under the Truth in Lending Law is incorrect and this Court's guidance is required to insure that subsequent decisions do not similarly err in the application of an important federal statute. | 14 |
| Conclusion | 18 |
| Certificate of Service | 18 |
| Appendices: | |
| A. Judgment and Opinion of the United States Fifth Circuit Court of Appeals | A-1 |
| B. Judgment of the United States District Court for the Western District of Texas | B-1 |
| C. Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas | C-1 |

# TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| Cantrell v. First National Bank of Euless, 560 S.W.2d 721 (Tex. Civ. App. 1977, writ ref'd n.r.e.) | 10 |
| Don J. Cummings Co. v. Aluminum Manufacturing Co., Corp., 371 F.2d 118 (10th Cir. 1967) | 12 |
| Dowling v. NADW Marketing, Inc., 578 S.W.2d 475 (Tex. Civ. App. 1979, writ ref'd n.r.e.) | 13 |
| Ford Motor Credit Co. v. Spann, 153 Ga. App. 535, 265 S.E.2d 863 (Ga. Ct. App. 1980) | 16 |
| Gerasta v. Hibernia National Bank, 411 F. Supp. 176 (E.D. La. 1976), *rev'd on other grounds*, 375 F.2d 580 (5th Cir. 1978) | 10 |
| In re Dunne, 407 F. Supp. 308 (D. R.I. 1976) | 8 |
| Jones v. Seldon's Furniture Warehouse, Inc., 357 F. Supp. 886 (E.D. Va. 1973) | 8 |
| Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) | 16 |
| Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) | 8 |
| Murphy v. Household Finance Corp., 560 F.2d 206 (6th Cir. 1977) | 8 |
| Ninth Liberty Loan Corp. v. Hardy, 53 Ill. App. 3d 601, 368 N.E.2d 971 (1977) | 10 |
| Northwest Bank and Trust Co. v. Gutshall, 274 N.W.2d 713 (Iowa 1979) | 10 |
| Price v. Franklin Investment Co., Inc., 574 F.2d 594 (D.C. Cir. 1978) | 16 |
| Securities Investment Co. v. Finance Acceptance Corp., 474 S.W.2d 261 (Tex. Civ. App. 1971, writ ref'd n.r.e.) | 13 |
| Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975) | 8 |
| Shields v. First National Bank of Arizona, 56 F.R.D. 442 (D. Ariz. 1972) | 8 |
| Smith v. Chapman, 614 F.2d 968 (5th Cir. 1980) | 7, 9 |
| Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958) | 13 |
| Williams v. Public Finance Corp., 598 F.2d 349 (5th Cir. 1979), *reh'g denied*, 609 F.2d 1179 (5th Cir. 1980) | 8 |
| Woodman v. Bishop, 203 S.W.2d 977 (Tex. Civ. App. 1947, no writ) | 12, 13 |
| Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Development Co., 642 F.2d 744 (5th Cir. 1981) | 13 |

## UNITED STATES STATUTES


15 U.S.C. § 1601 ..... 8, 17
15 U.S.C. §§ 1601-1646 ..... 2, 4, 8
15 U.S.C. § 1602(f) ..... 2, 6
15 U.S.C. § 1631(a) ..... 14
15 U.S.C. § 1640 ..... 2, 14
15 U.S.C. § 1640(a)(2) ..... 8
15 U.S.C. § 1640(a)(3) ..... 8
15 U.S.C. § 1692(a)-(o) ..... 10
28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 1337 ..... 4


## CODE OF FEDERAL REGULATIONS


12 C.F.R. § 226.1 *et seq.* ..... 14
12 C.F.R. § 226.2(h) ..... 16
12 C.F.R. § 226.2(s) ..... 6, 15


## TEXAS REVISED CIVIL STATUTES ANNOTATED


Articles 5069-1.01 to 8.05 ..... 3, 4
Articles 5069-6.02 to 6.05 ..... 9
Article 5069-8.01 ..... 3, 9, 10
Article 5069-8.01(h) ..... 10, 11
Article 5069-11.01 *et seq.* ..... 10


## OTHER STATUTES


Colorado Revised Statutes § 5-5-203(1)(a) ..... 11
District of Columbia Code Annotated § 28-3813(d)(1) ... 11
Hawaii Revised Statutes § 476-22 ..... 11
Indiana Code Annotated § 24-4.5-5-203(1)(a) ..... 11
Iowa Code Annotated § 537.5201(1)(y) ..... 11
Iowa Code Annotated § 537.5307(8) ..... 11
Iowa Code Annotated § 537.7101 ..... 11
Kansas Statutes Annotated § 16a-5-201(1) ..... 11
Maine Revised Statutes Annotated title 9-A, § 8-208 ..... 11
Wyoming Statutes Annotated § 40-14-522 ..... 11


## TEXTS


RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) ..... 12
Weintraub, COMMENTARY ON THE CONFLICT OF LAWS, § 7.3A (2d ed. 1980) ..... 13
Weintraub, COMMENTARY ON THE CONFLICT OF LAWS, § 7.3C (2d ed. 1980) ..... 12

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*To The Honorable, The Chief Justice of the United States and the Associate Justices of the United States Supreme Court.*

Petitioner, Robert L. Gumm, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *J. O. Turner v. Robert L. Gumm,* 685 F.2d 1384, entered August 27, 1982, with rehearing denied on September 30, 1982.

## OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Fifth Circuit, reported without opinion at 685 F.2d 1384 (1982), is set forth in Appendix A, *infra*. The judgment of the District Court for the Western District of Texas is set forth in Appendix B, *infra*. The Findings of Fact and Conclusions of Law of the District Court for the Western District of Texas is set forth in Appendix C, *infra*.

## JURISDICTION

The judgment sought to be reviewed was entered on August 27, 1982. Appellant's Petition for rehearing was denied on September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutes involved are the "Truth in Lending Act," 15 U.S.C. §§ 1601-1646, which although subsequently amended, provided in relevant part:

§ 1602(f).

> The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

§ 1640(a).

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this sub-

chapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of the individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

The "Texas Consumer Credit Code," TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 to 8.05, which although subsequently amended, provided in relevant part:

Art. 5069-8.01.

Any person who violates this Subtitle by contracting for, charging or receiving interest, time price differential or other charges which are greater than the amount authorized by this Subtitle, or by failing to perform any duty specifically imposed on him by any provision of this Subtitle, shall forfeit to the

> obligor twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorney's fees fixed by the court, provided that there shall be no penalty for a violation which results from an accidental and bona fide error.

All subsequent references to either the Truth in Lending Law or the Texas Consumer Credit Code are the 1974 text, unless otherwise indicated.

## STATEMENT OF THE CASE

On October 31, 1975, J. O. and Louise Turner, Respondents (hereinafter "Plaintiffs"), brought this claim aganist Petitioner, Robert L. Gumm, an individual doing business under the trade name of Bob's Mobile Home Sales and Desert-Aire Mobile Home Styling and Sales, Inc. (hereinafter "Defendant"), under the federal Truth in Lending Act, 15 U.S.C. §§ 1601-1646, and the Texas Consumer Credit Code, Art. 5069-1.01-8.05, TEX. REV. CIV. STAT. ANN. Jurisdiction was based upon 28 U.S.C. § 1337, with respect to the federal claim and upon the doctrine of pendent jurisdiction with respect to the state claim. Plaintiffs, residents of Texas residing close to the New Mexico border, alleged that the contract, entered into by Plaintiffs with Security National Bank of Roswell, New Mexico (hereinafter "Bank"), violated Texas and federal disclosure laws. Plaintiffs sought damages and attorney's fees under both Texas and federal law.

After many preliminary motions and hearings not directly relevant to this petition, a trial to the court was held on February 26, 1981. The following evidence was presented and incorporated into the district court's "Findings of Fact." Appendix C, *infra*.

On or about August 30, 1974, Plaintiffs and Defendant contracted for the sale of a mobile home. The parties signed a retail installment contract, prepared by Defendant. This agreement, which was not challenged by Plaintiffs, provided that the Defendant would sell Plaintiffs a mobile home for $13,520.00. Financing was to be arranged separately.

Based on this contract and prior to the Plaintiffs' obtaining financing, Defendant delivered the mobile home to the Plaintiffs.

After delivery, Mutual Savings of Las Cruces, New Mexico, the expected financier, backed out of the loan. Seeking alternative financing, Plaintiffs negotiated with Mr. Bob King of Delta Corporation to secure alternative financing. Delta Corporation arranged a loan for Plaintiffs with Bank. Defendant did not participate in any of the financing negotiations. Although Defendant had an agreement with Delta whereby Delta would pay a fee to Defendant in connection with loans originated by Defendant, this agreement had apparently been repudiated because no fee was in fact received as a result of Plaintiffs' agreement with Bank. Delta Corporation's Mr. King arranged the financing, and he and Bank prepared the documents. Delta Corporation procured Plaintiffs' signature on the agreement with Bank in Texas; Bank then accepted and signed the agreement in Roswell, New Mexico. As part of the agreement, Plaintiffs signed a blank retail installment sales contract listing Defendant as seller. The agreement between Bank and Plaintiffs provided in relevant part: "This Contract shall be governed by the laws of the State of New Mexico." It is this contract which is the subject of this action and which Plaintiffs assert violates federal and Texas disclosure laws.

At the request of Bank, Defendant "assigned" this contract to Bank in return for a check to Defendant in the full amount of the purchase price. This check listed Plaintiffs as "remitter." Defendant's only involvement with the transaction between Plaintiffs and Bank occurred after Plaintiffs had completed their agreement with Bank, many weeks after Plaintiffs and Defendant had completed their transaction and after the mobile home already had been delivered. Defendant's "assignment" of the retail installment contract, signed by Plaintiffs, was a formality necessary to consummate Bank's loan to Plaintiffs.

At trial, the district court found that the retail installment contract signed by Plaintiffs at the request of Delta Corporation and "assigned" by Defendant to Bank in return for financing by Bank was subject to the Federal Truth in Lending Act. Despite the contractual choice-of-law provisions and the parties' significant contacts with New Mexico, the court also found the agreement subject to Texas law. Further, although the loan agreement was between Plaintiff and Bank, the court considered Defendant a creditor for purposes of Truth in Lending because he "arranged for the extension of credit." 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s) (1982); Appendix C, *infra*, at p. C-5. Finding that the retail installment contract did not comply with the disclosure requirements of state and federal law, the court awarded Plaintiffs damages in the amount of $1,000 under federal law and $16,203.68 under state law. Damages were assessed in accordance with the applicable state and federal provisions which measured damages as twice the finance charge. Appendix C, *infra*, at p. C-8. Federal law, however, limited damages to a maximum of $1,000 whereas Texas law awarded damages of twice the finance charge without

any ceiling. The district court also awarded Plaintiff $9,360 in attorneys' fees under both federal and state law. Appendix C, *infra*, at p. C-9.

The Fifth Circuit affirmed the trial court and found Defendant to be a creditor, based on the participation agreement with Delta Corporation and its belief, unsupported by the evidence, that Defendant received a fee in connection with the assignment. Appendix A, *infra*, at p. A-4; Appendix C, *infra*, at p. C-3. Further, relying on *Smith v. Chapman*, 614 F.2d 968, 977-78 (5th Cir. 1980), the appellate court found that a double recovery under state and federal disclosure laws was permissible. Appendix A, *infra*, at p. A-8. The Fifth Circuit rendered no opinion on whether the parties' choice-of-law provision should have been recognized.

## REASONS FOR GRANTING THE WRIT

### I. THE AWARD OF A "DOUBLE RECOVERY," DAMAGES UNDER BOTH FEDERAL CONSUMER PROTECTION LAWS AND STATE CONSUMER PROTECTION LAWS, FOR A SINGLE ACT OF MISCONDUCT IS INCONSISTENT WITH LEGISLATIVE INTENT AND UNNECESSARILY PUNITIVE, AND PRESENTS AN IMPORTANT FEDERAL QUESTION WITH SIGNIFICANT IMPACT ON THE EXTENSION OF CREDIT.

Since the late 1960s, Congress and state legislatures have enacted numerous laws designed to offer increased protection to consumers. Unfortunately, Congress and the many states have often acted independently. Consequently, a duplicity of consumer protection enactments

is not uncommon, and while the goal of ensuring adequate protection to consumers is admirable, this case demonstrates the hardships and inequities that can arise when both state and federal laws are applied to the same wrong to permit a "double recovery."

The Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1646 (1976), requires that creditors make certain disclosures to consumers before a final decision regarding the purchase of credit is made. "It is the purpose of this subchapter [Truth in Lending] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit. . . ." 15 U.S.C. § 1601, *see also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 364-65 (1973). To encourage private enforcement of the law and provide adequate remedies to aggrieved consumers, Truth in Lending permits a successful plaintiff to recover, *in addition* to any actual damages, twice the amount of the finance charge except that this additional recovery may not be less than $100 nor greater than $1,000, 15 U.S.C. § 1640(a)(2), plus attorney's fees, 15 U.S.C. § 1640(a)(3). *See Williams v. Public Finance Corp.*, 598 F.2d 349 (5th Cir. 1979), reh'g denied, 609 F.2d 1179 (5th Cir. 1980). This liberal recovery is designed to compensate borrowers for injuries caused by misleading disclosures, to provide "civil penalties" sufficient to promote private litigation, and to serve as a deterrent. *Murphy v. Household Finance Corp.*, 560 F.2d 206 (6th Cir. 1977); *Sellers v. Wollman*, 510 F.2d 119 (5th Cir. 1975); *In re Dunne*, 407 F. Supp. 308 (D. R.I. 1976); *Jones v. Seldon's Furniture Warehouse, Inc.*, 357 F. Supp. 886 (E.D. Va. 1973); *Shields v. First National Bank of Arizona*, 56 F.R.D. 442 (D. Ariz. 1972).

At approximately the same time Congress was considering the Truth in Lending Act the State of Texas enacted its Consumer Credit Code. An essential part of this law is the chapters dealing with Retail Installment Sales, specifically Texas Revised Civil Statutes Annotated, Articles 5069-6.02 to 6.05 (1971). These provisions set forth specific disclosure requirements and list various prohibited practices. The state law goes beyond the Truth in Lending Law by requiring disclosure as well as mandating the inclusion of certain provisions. At the time of the action in the instant case a person who violated the Texas Consumer Credit Code was liable to the consumer for twice the amount of the interest or the time-price differential, plus reasonable attorney's fees. TEX. REV. CIV. STAT. ANN. Art. 5069-8.01.

Because of the similarity between the Truth in Lending Law and the Texas Consumer Credit Code, a creditor who violates one will often, by the same conduct, violate the other. For example, a creditor who makes no disclosures would be liable for a "double recovery" under both statutes. In granting Plaintiffs such a double recovery, the Fifth Circuit in the instant case directly addressed this question, stating: "We have held that such a dual recovery is permissible, *Smith v. Chapman*, 614 F.2d 968, 977-78 (5th Cir. 1980). . . ." Appendix A, *infra*, at p. A-8.

The Fifth Circuit in *Chapman* did not so hold. In *Chapman*, the court, while permitting a double recovery, stated: "The propriety of the imposition of the double finance charge penalty twice, once for the federal and once for the state violation, was not raised by the Appellants, and we do not pass on it here." 614 F.2d at 971 n.2. The courts, in considering the propriety of such

a double recovery, are divided. For example, in *Northwest Bank and Trust Co. v. Gutshall,* the Iowa Supreme Court refused to permit a double recovery for a violation of the Truth in Lending Act and the Iowa Consumer Credit Code. 274 N.W.2d 713, 721 (Iowa 1979). As the court noted in *Ninth Liberty Loan Corp. v. Hardy,* 53 Ill. App. 3d 601, 368 N.E.2d 971, 975 (1977): "[W]e regard the remedies afforded by the two Acts as duplicitous, not cumulative." In *Cantrell v. First National Bank of Euless,* 560 S.W.2d 721, 729 (Tex. Civ. App. 1977, writ ref'd n.r.e.), the court permitted a double recovery, doubting, however, "that provision for imposition of penalties by both the federal and state laws were intended by either the Congress or Texas Legislature. . . ." This Court must undertake the task of determining congressional intent.

Defendant recognizes that the Texas Legislature has eliminated the possibility of a double recovery under both the Truth in Lending Law and the Texas Consumer Credit Code through the amendment of Article 5069-8.01. Subsection (h) of this section now provides that liability under the Texas Consumer Credit Code is "in lieu of and not in addition to . . . liability under the Federal Consumer Credit Protection Act. . . ." TEX. REV. CIV. STAT. ANN. Art. 5069-8.01(h) (Vernon Supp. 1982). However, this amendment does not apply to protect the Defendant from the inequities of prior law. Further, other Texas statutes designed to protect consumers still permit duplicitous recovery when applied with federal law. *See, e.g.,* Texas Debt Collection Act. TEX. REV. CIV. STAT. ANN. Art. 5069-11.01 *et seq.* (Vernon Supp. 1982) and Fair Debt Collection Practices Act, 15 U.S.C. § 1692(a)-(o) (Supp. IV 1980). Numerous other states also have statutes which give rise to the possibility of a double recovery because of the overlap of federal and state law. *See, e.g.,*

COLO. REV. STAT. § 5-5-203(1)(a) (1973) (credit disclosure law); D.C. CODE ANN. § 28-3813(d)(1) (1981) (credit disclosure law); HAWAII REV. STAT. § 476-22 (1976) (debt collection); IND. CODE ANN., § 24-4.5-5-203(1)(a) (Burns 1982) (credit disclosure); IOWA CODE ANN. §§ 537.7101, 537.5201(1)(y) (West Supp. 1982) (debt collection); KAN. STAT. ANN. § 16a-5-201(1) (1974) (debt collection); ME. REV. STAT. ANN. tit. 9-A, § 8-208 (Supp. 1982) (credit disclosure law); WYO. STAT. ANN. § 40-14-522 (1977) (credit disclosure).

Several states have resolved legislatively some instances of "double recovery." *See, e.g.*, TEX. REV. CIV. STAT. ANN. Art. 5069-8.01(h) (Vernon Supp. 1982); IOWA CODE ANN. § 537.5203(8) (West Supp. 1982). In most cases, however, it is left to the various state and federal courts to resolve this issue of federal statutory interpretation. This Court should issue a writ of certiorari not only to resolve the split among the courts considering the relationship between federal and state law with regard to consumer statutes, but also to ensure uniformity in the application of the Truth in Lending Law penalty.

## II. THE FIFTH CIRCUIT ERRED BY NOT CONSIDERING WHETHER TO GIVE EFFECT TO THE CONTRACTED FOR CHOICE-OF-LAW PROVISION, DESIGNATING NEW MEXICO LAW AS CONTROLLING, AND THE DISTRICT COURT ERRED BY REFUSING TO GIVE EFFECT TO THE CHOICE-OF-LAW PROVISION BASED ON "WHERE THE CONTRACT WAS ENTERED INTO" INSTEAD OF WHERE THE CONTRACT WAS MADE.

In the United States, the general rule applied to an express choice-of-law provision made for the purpose of

controlling disputes arising out of a contract is that such a provision *will be enforced* if the contract and the transaction of which it is part bear a "reasonable relationship" to the jurisdiction whose law is chosen. *See generally* RESTATEMENT (SECOND) ON THE CONFLICT OF LAWS § 187 (1971); Weintraub, COMMENTARY ON THE CONFLICT OF LAWS, § 7.3C (2d ed. 1980). In the instant case Plaintiffs entered into two contractual agreements. The first, entered into between Plaintiffs and Defendant, in Texas, was for the sale of the mobile home. The second, entered into between Plaintiffs and Bank, was for the financing of the mobile home. The Plaintiffs based their cause of action on documents arising out of the second transaction which was between Plaintiffs, both Texas residents, and Bank, a New Mexico resident. Although Delta Corporation, a Texas intermediary, arranged the contract, Bank consummated the contract in New Mexico. Payments were made in New Mexico, and upon default the mobile home was repossessed and brought to New Mexico.

The district court held that the transaction was subject to Texas law because the contract was "entered into" in Texas. Appendix C, *infra,* at p. C-4. The court erred in two important respects. First, it did not distinguish between the contract of sale and the contract of financing. Second, the court mistakenly held that the *contract* was entered into in Texas. A contract does not exist until there is an offer and acceptance. A contract, therefore, is "entered into" at the place of its making. General contract law has long recognized that the place of a contract's making is the geographical location where the acceptance of the offer to contract became effective. *See, e.g., Don J. Cummings Co., Inc. v. Aluminum Manufacturing Co., Corp.,* 371 F.2d 118 (10th Cir. 1967); *Woodman v.*

*Bishop*, 203 S.W.2d 977 (Tex. Civ. App. 1947, no writ); Weintraub, COMMENTARY ON THE CONFLICT OF LAWS, § 7.3A (2d ed. 1980). In the instant case, the contract at issue is the one for financing, and this was made in New Mexico. The Fifth Circuit and the courts of Texas have recognized that a contractual choice-of-law agreement, such as the one in the contract arising out of the New Mexico financing of the mobile home, should be given validity so long as a reasonable relationship exists between the transaction and the law selected. *See, e.g., Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Development Co.*, 642 F.2d 744 (5th Cir. 1981); *Teas v. Kimball*, 257 F.2d 817 (5th Cir. 1958); *Dowling v. NADW Marketing, Inc.*, 578 S.W.2d 475 (Tex. Civ. App. 1979, writ ref'd n.r.e.); *Securities Investment Co. v. Finance Acceptance Corp.*, 474 S.W.2d 261 (Tex. Civ. App. 1971, writ ref'd n.r.e.). The transaction between Bank, a New Mexico resident, and Plaintiffs, clearly bears more than a "reasonable relationship" to New Mexico.

The district court's failure to fully perceive the true relationship of the parties to this transaction serves to contravene the correct application of federal and state consumer protection laws. Such laws provide broad inclusive definitions of the term "creditor," including, for example, "arrangers," to ensure that consumers will be afforded adequate means of redress. The broad definitions of the Truth in Lending Law, however, should not determine the situs of a contract. The district court's analysis of the instant transaction ignores reality. At issue in this case is a loan agreement between Plaintiffs and a New Mexico Bank with payment and finalization both to occur in New Mexico. Defendant's alleged liability as a creditor is based on a statutory definition which makes

him liable as an arranger when in fact he was not a party to the financing contract. Admitting liability under the Truth in Lending Law for purposes of argument only, such liability should not be the basis for additional contractual or state statutory liability premised upon a contract which clearly provides governance by New Mexico law. The district court's error in applying Texas law to this transaction has caused Defendant grievous financial harm and if followed by other courts could severely impair commercial transactions, particularly in border communities.

## III. THE ANALYSIS EMPLOYED BY THE COURTS BELOW TO IMPOSE LIABILITY ON DEFENDANT AS A CREDITOR UNDER THE TRUTH IN LENDING LAW IS INCORRECT, AND THIS COURT'S GUIDANCE IS REQUIRED TO ENSURE THAT SUBSEQUENT DECISIONS DO NOT SIMILARLY ERR IN THE APPLICATION OF AN IMPORTANT FEDERAL STATUTE.

The Truth in Lending Law imposes a general requirement of disclosure which states that "each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended the information required under this part or part D of this subchapter." 15 U.S.C. § 1631 (a). A creditor who violates the provisions of the Truth in Lending Law or its regulations (Regulation Z, 12 C.F.R. § 226.1 *et seq.*) is liable for actual damages plus a penalty of twice the finance charge, but the recovery cannot be less than $100 nor greater than $1,000. 15 U.S.C. § 1640.

To ensure compliance with the law, prevent its circumvention, and provide a convenient Defendant, Truth in

Lending adopts a very broad definition of creditor. At the time of this action creditor was defined as any person who "regularly extends or arranges for the extension of consumer credit. . . ." 12 C.F.R. § 226.2(s).

The Fifth Circuit imposed liability upon Defendant under the Truth in Lending Law because it found that Defendant "regularly extends . . . consumer credit. . . ." Appendix A, *infra*, at p. A-8.

The district court also found Defendant to be a creditor; however, that court focused on the fact that "he regularly arranged for the extension of credit. . . ." Appendix C, *infra*, at p. C-5. Assuming that both of these conclusions are correct, as general statements of fact, the imposition of liability is still improper because specific consideration was not given to whether Defendant was a creditor for purposes of the agreement out of which the alleged Truth in Lending Law violations occurred. Liability under the Truth in Lending Law must be premised upon one's involvement in a specific transaction, not an individual's general status as a creditor. As the Statement of Facts indicates, pages 5 to 6, *supra*, Defendant's involvement with the lending transaction out of which this case arises was at best ministerial. The purposes of the Truth in Lending Law are in no way furthered by the imposition of a statutory penalty upon an uninvolved party. Contrary to the Fifth Circuit's suggestion, merely being a creditor is not sufficient grounds for the imposition of Truth in Lending penalties. The Truth in Lending Law requires that a person be a creditor with respect to the transaction in issue. Defendant clearly was not a creditor with respect to the transaction complained of by Plaintiffs. Defendant was the seller; Bank was the creditor. Liability, therefore,

can only be imposed on Defendant if he was an "arranger" of the credit granted by Bank to Plaintiffs.

To be an arranger of credit a person must provide or offer to provide consumer credit and either receive a fee for such service or participate in the preparation of the contract documents. 12 C.F.R. § 226.2(h). Defendant did not participate in the preparation of the documents nor did he receive a fee. Appendix C, *infra,* at p. C-3. Defendant did have a participation agreement with Delta Corporation whereby Defendant would receive a fee for loans arranged by Delta with various lenders. The question, then, is: Should the mere existence of the participation agreement between a seller and an arranger of credit be a sufficient basis for imposing liability under the Truth in Lending Law?

In considering whether a person is a creditor, the courts have made it clear that a seller's merely benefiting from the extension of credit is not enough to hold him liable as an arranger. *Gerasta v. Hibernia National Bank,* 411 F. Supp. 176, 186 (E.D. La. 1976), *rev'd on other grounds,* 575 F.2d 580 (5th Cir. 1978). Either a close relationship between the lender and the seller or the payment of a fee is necessary for liability. *See, e.g., Meyers v. Clearview Dodge Sales, Inc.,* 539 F.2d 511 (5th Cir. 1976), *cert. denied,* 431 U.S. 929 (1977); *Price v. Franklin Investment Co., Inc.,* 574 F.2d 594 (D.C. Cir. 1978). Where the seller is a mere "conduit" to the transaction, liability should not be imposed. *Ford Motor Credit Co. v. Spann,* 153 Ga. App. 535, 265 S.E.2d 863 (Ga. Ct. App. 1980).

In the instant case Defendant had no relationship with the Bank. He had consummated the sale with Plaintiff

and delivered the mobile home prior to any involvement by the Bank. His only contact with the Bank was a ministerial assignment of a retail installment contract drawn up by the lender and naming Defendant as a seller. The arranger of the credit in this case was Delta Corporation. At most, Defendant can only be said to be an arranger of the arranger.

The courts below have interpreted the Truth in Lending Law as not requiring a close scrutiny of the transaction at issue to determine Defendant's status. This is a misapplication of federal law and inconsistent with the purpose of the Truth in Lending Law. Truth in Lending is designed to permit a consumer "to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . ." 15 U.S.C. § 1601 (1976). The imposition of liability on Defendant in no way accomplishes this objective.

Defendant was not a creditor in this transaction. He did not set the terms of the agreement nor did he receive the periodic payments. Defendant's participation in the transaction was so far removed from the final agreement that he cannot be considered an arranger of this transaction. It is impracticable and unrealistic to impose disclosure requirements on the Defendant. His participation could be classified as that of an initiator, but no more.

This Court must consider this important issue of federal statutory interpretation to ensure that other courts do not so err. It is important to note that the relevancy of this Court's involvement is in no way diminished by the many recent amendments to Truth in Lending.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Dated: Houston, Texas

December , 1982

Respectfully submitted,

JAMES FRANKLIN SCHERR
425 Myrtle Street
El Paso, Texas 79901
(915) 544-0100

*Attorney for Petitioner*

*Of Counsel:*

RICHARD M. ALDERMAN
University of Houston Law Center
Houston, Texas 77004

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Michael Crowley, 1808 State National Plaza, El Paso, Texas 79901, by United States certified mail, return receipt requested, postage prepaid, on this _____ day of December 1982.

JAMES F. SCHERR

## APPENDIX A

**Decision of the Court of Appeals for the Fifth Circuit.**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1469

D. C. Docket No. EP-75-CA-239

(Filed Oct. 19, 1982)

J. O. TURNER and wife, FERN LOUISE TURNER,
Plaintiffs-Appellees,

v.

ROBERT L. GUMM, d/b/a DESERT-AIRE
MOBILE HOME STYLING AND SALES,
INC., and BOB'S MOBILE
HOME SALES,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

Before BROWN, WISDOM and RANDALL,
Circuit Judges.

### JUDGMENT

This cause came on to be heard on the record on appeal, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 27, 1982

ISSUED AS MANDATE: Oct. 18, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1469

(Filed Oct. 19, 1982)

J. O. TURNER and wife FERN LOUISE TURNER,
Plaintiffs-Appellees,

v.

ROBERT L. GUMM, d/b/a DESERT-AIRE
MOBILE HOME STYLING AND SALES,
INC., and BOB'S MOBILE
HOME SALES,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

( August 27, 1982 )

Before BROWN, WISDOM and RANDALL,
Circuit Judges.

PER CURIAM:

Robert L. Gumm, an El Paso, Texas businessman, d/b/a Bob's Mobile Homes, appeals the District Court's judgment in this Truth-in-Lending case. Unimpressed by the scattershot arguments he advances, we affirm.

## I.

### *A Sticky Deal*

J. O. and Fern Louise Turner purchased a mobile home from Gumm on August 30, 1974. Delta Corporation of America (Delta) arranged the financing with Security National Bank of Roswell, New Mexico (SNB). In late October or early November 1974, the Turners signed in blank a retail installment contract and security agreement, a copy of which they introduced in evidence.[1] Gumm assigned the contract to SNB and received a check for $12,118. Under a participation agreement he had with Delta, he also received a fee in connection with the assignment. Gumm had obtained insurance on the mobile home, although the policy included no provision for waiver by the carrier of subrogation rights against the Turners, but did not disclose all the details.

The Turners sued Gumm and Delta on October 31, 1975, asserting a federal claim under the Federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, and a state claim under the Texas Consumer Credit Code, Vern. Tex. Rev. Civ. Stat. art. 5069-6.01 *et seq.*[2] Gumm in May

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1. Even the legitimacy of this copy of the contract comes under attack. Gumm argues that he never signed it. Yet it bears a signature purporting to be his, and on the reverse side he has assigned it to SNB. He does not deny the assignment. We accept this copy as authoritative for present purposes.

2. 15 U.S.C. § 1605 provides:

Determination of finance charge
Definition

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not

1976 sought to join SNB as a party, but the special

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include charges of a type payable in a comparable cash transaction. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:

* * *

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

* * *

Property damage and liability insurance premiums included in finance charge.

(c) Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

Tex. Rev. Civ. Stat. Ann. Art. 5069-6.04(3) provides:

When insurance is required in connection with such a contract or agreement made under this Chapter, the seller or holder shall furnish the buyer a statement which shall clearly and conspicuously state that insurance is requested or required in connection with the contract, and that the buyer shall have the option of furnishing the required insurance either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. In addition when any requestsed or required insurance is sold or procured by the seller or holder at a premium or rate of charge not fixed or approved by the State Board of Insurance, the seller or holder shall include such fact in the foregoing statement, and the buyer shall have the option for a period of five days from the date of the contract or agreement of furnishing the required insurance coverage either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverage through any insurance company authorized to transact business in Texas. Such statement or statements may be made in conjunction with or as part of the retail installment contract required by Article 6.02 or the retail charge agreement required by Article 6.03, respectively.

And Article 5069-6.04(b) states:

The contract or agreement must state the kind, coverage, term and amount of premium for such insurance.

master[3] denied the motion. In January 1978, after settling with Delta, the Turners amended their complaint and moved to dismiss Delta. The master took no action on the motion. In May, four months later, Gumm, without requesting leave to file, cross-claimed against Delta. The special master belatedly dismissed Delta. Gumm did not object.

On January 3, 1981, Gumm requested a jury trial. The District Court did not respond but commenced trial without a jury on February 27, 1981.

The Court, in its Findings of Fact and Conclusions of Law, held Gumm liable for violation of 15 U.S.C. § 1605 in failing to disclose the cost of insurance. Invoking pendent jurisdiction over the state claim, it also found Gumm liable for such violations under the Texas Consumer Credit Code. It awarded the Turners $26,563.68 in damages.[4]

## II.

Gumm launches a barrage of attacks against the District Court's findings, some proper, some not. The only point he does not make is a defense on the merits. So far as we can discern, Gumm no longer denies that he

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3. Since neither party explained the appointment of the special master, we *sua sponte* requested letter briefs on the subject. It appears that at that time the Western District of Texas routinely referred all Truth-in-Lending cases to a special master. He conducted the pretrial matters without, it seems, any objection from either party. The Court subsequently countermanded this order and took these cases back. Trial was had before the District Court.

4. The sum comprised the statutory limit for the federal violation ($1,000), twice the "interest or time price differential" under Texas law ($16,203.68), and attorney's fees ($9360).

violated the consumer statutes but now seeks to overturn the judgment on "policy" grounds.[5]

Without citing F.R.Civ.P. 19, Gumm alleges that the Court erred in not holding SNB to be an indispensable party. SNB has no interest in this lawsuit. Whatever Gumm's rights as against SNB, if any, his allegations raise no issue as to joinder.

Making much the same "policy" argument, Gumm protests the special master's dismissal of Delta. After the Turners voluntarily dismissed their claim against Delta, Gumm, without seeking leave of court, cross-claimed against it. The special master properly struck the cross-claim, and Gumm did not object. Nor did he raise the point at trial. That failure to object waives the argument here.

While the right to jury trial "shall be preserved to the parties inviolate", F.R.Civ.P. 36(b) requires the demand for jury trial "not later than 10 days after the service of the last pleading directed to such issue." Gumm served his request within 10 days of his response to Turner's motion for summary judgment, but well after the initial pleadings—complaint and answer—had been filed. F.R. Civ.P. 7(a) excludes such motions and responsive papers from the definition of pleadings. Since he did not timely file for a jury trial within 10 days of the initial pleadings, Gumm cannot assert the mandatory right here. McCorstin v. U.S. Department of Labor, 630 F.2d 242 (5th Cir. 1980), *cert. denied,* 450 U.S. 999, 101 S.Ct. 1705, 68 L.Ed.2d 201 (1981). *See generally* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2320 (1971).

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5. Gumm protests that he is a poor small businessman and that the Turners should sue SNB and Delta, the big corporations, instead.

That SNB or Delta are "creditors" does not mean, as Gumm would have us to believe, that he is not a "creditor." 15 U.S.C. § 1602(f) defines a creditor as one who both "regularly extends . . . consumer credit which is payable by agreement in more than four installments [and] to whom the debt arising from the consumer credit transaction is initially payable." Whether or not the others fall within this definition, Gumm certainly does.

Gumm finally complains that the Turners obtain a "double recovery" by virtue of the overlap of the federal and Texas consumer protection claims. We have held that such dual recovery is permissible, Smith v. Chapman, 614 F.2d 968, 977-78 (5th Cir. 1980), at least prior to the 1977 amendment to the state Act. While such liberality may prove a boon to a plaintiff, it comports with the remedial purposes of these statutes.

Gumm protests the District Court's award of attorney's fees. Mindful of Judge Rubin's admonition that "[t]he Truth in Lending Act was not intended to be an endowment for lawyers", McGowan v. King, 661 F.2d 48, 52 (5th Cir. 1981), we find that the District Court did not stray from the path of reason. The Judge took into account the experience of the Turners' lawyers, the number of hours they worked, the difficulty of understanding Gumm's defenses, and the reasonable hourly charge in El Paso, Texas for comparable representation. These factors are among those we enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The Judge did not abuse his discretion.

Most of Gumm's remaining complaints center on the District Judge's factual findings. After reviewing them, we see no basis, under the guiding hand of F.R.Civ.P.

52(a), to reverse but defer to Judge Hudspeth who heard the testimony, observed the witnesses' demeanor, studied the exhibits, and suffered through the trial. Gumm's remaining claims have no merit, and we decline to address them.

AFFIRMED.

## APPENDIX B

### Judgment of District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-75-CA-239

(Filed July 29, 1981)

J. O. TURNER and wife, FERN LOUISE TURNER,
Plaintiffs,

v.

ROBERT L. GUMM and DESERT AIRE MOBILE HOME STYLING AND SALES, INC., individually and d/b/a BOB'S MOBILE HOMES,
Defendant.

### JUDGMENT

On the 26th day of February, 1981, the above cause came on for trial before the Court without a jury. The Court, having considered the testimony, the exhibits, and the arguments of counsel, finds that judgment should be entered in accordance with the findings of fact and conclusions of law this day filed.

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiffs J. O. Turner and Fern Louise Turner have judgment against the Defendant Robert L. Gumm, individually and d/b/a Bob's Mobile Home Sales, in the amount of TWENTY-SIX THOUSAND FIVE HUNDRED SIXTY-THREE AND 68/100 ($26,563.68)

DOLLARS, plus interest at the legal rate from the date of judgment until paid, plus costs of court, for all of which let execution issue.

SIGNED AND ENTERED this 29th day of July, 1981.

/s/ HARRY LEE HUDSPETH
Harry Lee Hudspeth
United States District Judge

# APPENDIX C

## District Court Findings of Fact and Conclusions of Law

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-75-CA-239

(Filed July 29, 1981)

J. O. TURNER and wife, FERN LOUISE TURNER,
Plaintiffs,

v.

ROBERT L. GUMM and DESERT AIRE MOBILE HOME STYLING AND SALES, INC., individually and d/b/a BOB'S MOBILE HOMES,
Defendant.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are hereby entered in the above case.

A. *Findings of Fact.*

1. The Plaintiffs bring this suit under the Federal Truth-in-Lending Act, 15 U.S.C. § 1640(e), and the Texas Consumer Credit Code, Art. 5069 - 6.01 *et seq.*, Tex. Rev. Civ. Stat. Ann. Jurisdiction is based upon 28 U.S.C. § 1337, with respect to the federal claim, and upon the doctrine of pendent jurisdiction with respect to the claim under state law.

2. Plaintiffs J. O. and Fern Louise Turner are residents of Dell City, Texas. At the time of the transaction which gives rise to this suit, they lived in Happy, Texas. Defend- and Robert L. Gumm is an individual doing business in El Paso, Texas, under the trade names Bob's Mobile Home Sales and Desert Aire Mobile Home Styling and Sales, Inc.

3. At all times pertinent to this suit, the Defendant was a retail seller of mobile homes who regularly entered into security agreements and retail installment contracts containing terms providing for credit payable by arrangement in more than four installments, and for which the payment of a finance charge is required.

4. On August 30, 1974, in El Paso, Texas, Plaintiffs purchased from Defendant a 1973 Monte Carlo mobile home, including furniture and equipment. The selling price was $13,520.00, with a down payment of $1,500.00 and the remainder financed. This mobile home was purchased as a residence for Plaintiffs, not for business use.

5. Delta Corporation of America was a mobile home service company that arranged for the purchase of retail installment sales contracts by lending institutions. Bob King, an employee of Delta, advised the Defendant that Mutual Savings of Las Cruces, a New Mexico lending institution, had approved the financing of the Monte Carlo mobile home, and that it should be delivered to the Plaintiffs. The Defendant did deliver the mobile home to Plaintiffs at Dell City, Texas, some 100 miles east of El Paso in Hudspeth County. Then, for reasons never clearly explained in the record, the expected financing at Mutual Savings of Las Cruces fell through. King then attempted to place the financing of the mobile home with another lending institution in New Mexico.

6. On or about October 29, 1974, King notified Plaintiffs and Defendant that the Security National Bank of Roswell, New Mexico had agreed to handle the contract. King came to Plaintiffs' home in Dell City and obtained their signatures on a blank retail installment contract and security agreement, dated November 1, 1974, which is the subject of this suit. Plaintiffs later received a completed copy of the installment contract (Pl. Ex. 6) through the mail. A Texas Certificate of Title to the mobile home was issued on November 20, 1974 (Pl. Ex. 3).

7. Defendant assigned the retail installment contract to the Roswell bank and received a check for $12,118.00 (Pl. Ex. 7). Plaintiffs began making monthly payments to the Roswell bank.

8. Defendant made no disclosures to the Plaintiffs other than those contained in the retail installment contract (Pl. Ex. 6).

9. Under the Defendant's arrangement with Delta Corporation, he was to receive a participation fee from Delta in connection with the assignment of the retail installment contract to the Security National Bank of Roswell. Defendant claims that he did not in fact receive a participation fee in connection with this transaction.

10. In connection with this sale, the Defendant obtained a policy of comprehensive physical damage insurance on the Plaintiffs' mobile home through the Foremost County Mutual Insurance Company (Pl. Ex. 2). The insurance policy included Vendor's Single Interest protection. No provision was made for the waiver by the carrier of subrogation rights against the Plaintiffs.

11. The Plaintiffs received in the mail a completed copy of the contract (Pl. Ex. 6). Defendant denied that this was the contract he signed, and produced his own copy of the retail installment contract (Pl. Ex. 9). He concedes that he did sign a document styled "Security National Bank of Roswell, New Mexico Security Agreement and Retail Installment Contract."

B. *Conclusions of Law.*

1. This Court has jurisdiction over the subject matter and the parties. Federal Truth-in-Lending Act, 15 U.S.C. § 1640(e) and 28 U.S.C. § 1337.

2. The transaction in question is also subject to the Texas Consumer Credit Code, Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.01 *et seq.* in that the contract was entered into in Texas. Art. 5069 - 6.01 has been interpreted to cover mobile homes not used to transport persons or property on a public highway. *Yates v. Mobile America Sales Corporation,* 591 S.W.2d 453 (1979).

3. This Court has pendent jurisdiction over the claim brought under the Texas Consumer Credit Code. Plaintiffs' claims under federal and state law arise under a "common nucleus of operative facts," and the Plaintiffs would ordinarily be expected to try all of the claims in one judicial proceeding. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). The reasons for exercising pendent jurisdiction are strong where, as in this case, the state claims implicate federal policy. *Hagans v. Levine,* 415 U.S. 528, 550 (1974).

4. The transaction entered into by Plaintiffs and the Defendant was a "consumer credit transaction" as defined by 15 U.S.C. § 1602(h), and was not an "exempted

transaction" as defined by 15 U.S.C. § 1603. The transaction involved "credit" within the meaning of 12 C.F.R. § 226.2(q); and because it was for personal, household, and family purposes, it constituted "consumer credit" within the meaning of 12 C.F.R. § 226.2(p).

5. The Defendant was a "creditor" as defined by 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s), in that he regularly arranged for the extension of credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required. "Arranging for the extension of credit" occurs when the person providing or offering to provide consumer credit receives or will receive a fee, compensation, or other consideration, or he has knowledge of the credit terms and participates in the preparation of the contract documents required for the extension of credit. 12 C.F.R. § 226.2(h). Here, the Defendant arranged for the extension of credit in that he anticipated receiving a participation fee from the agency (i.e. Delta) that secured the financing with the lending institution.

6. Since the credit extended was not "open end credit," the disclosure applicable to the extension of "credit other than open end" are applicable to this case. See 12 C.F.R. §§ 226.8(a), (b), and (c).

7. The Defendant violated the Truth-in-Lending Act in each of the following respects:

(a) By failing to include the cost of comprehensive physical damage insurance coverage in the finance charge as required by 15 U.S.C. § 1605 and § 226.4(a)(6) of Regulation Z. The insurance cost was made a part of the contract, but it was included in the "amount financed" rather than the "finance charge." Also, no clear and speci-

fic statement was furnished by the seller stating that the buyer could choose the person through whom the insurance was to be obtained.

(b) By failing to include the cost of Vendor's Single Interest insurance coverage in the finance charge as required by § 226.4(a)(b) and Interpretation § 226.404 where, as here, the insurance company did not waive its subrogation rights. In this instance also, the insurance cost was included in the "amount financed" and not the "finance charge."

8. The retail installment contract entered into by Plaintiffs and Defendant was a "retail installment transaction" as defined by the Texas Consumer Credit Code. Art. 5069 - 6.01(e), Tex. Rev. Civ. Stat. Ann.

9. Plaintiffs were "retail buyers" as defined by the Texas Consumer Credit Code. Art. 5069 - 6.01(c), Tex. Rev. Civ. Stat. Ann.

10. The Defendant was a "retail seller" as defined by The Texas Consumer Credit Code. Art. 5069 - 6.01(d), Tex. Rev. Civ. Stat. Ann.

11. The Defendant violated the Texas Consumer Credit Code in each of the following respects:

(a) By failing to deliver to the retail buyers, or mailing to them at their address shown on the retail installment contract, a copy of the contract as accepted by the seller, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.02(3). No evidence was produced to show that Plaintiffs received a copy of the contract that was signed by the Defendant.

(b) By failing to clearly and conspicuously disclose that the comprehensive physical damage insurance

was required in connection with said transaction, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5). A reference to "auto physical damage insurance" does not comply with the statute.

(c) By failing to disclose that the comprehensive physical damage insurance was sold at rates neither fixed nor approved by the State Board of Insurance, as required by Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5). The evidence showed that the insurance was purchased from a county mutual insurance company, the rates of which are not regulated by the State Board of Insurance.

(d) By failing to disclose the cost of comprehensive physical damage insurance, as required by Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5).

(e) By failing to disclose that the Vendor's Single Interest insurance coverage was required in connection with said transaction, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.04(3) and (5).

(f) By providing for the waiver of any claim based upon any unwritten modification of any of the terms or the conditions of the contract. Art. 5069 - 6.05 (6), Tex. Rev. Civ. Stat. Ann., prohibits a provision that the buyer agrees not to assert against the seller any claim or defense arising out of the sale.

(g) By providing for the waiver of any claim under the laws of the State of Texas, in violation of Tex. Rev. Civ. Stat. Ann., Art. 5069 - 6.05(6). The contract provides: "This contract shall be governed by the laws of the State of New Mexico."

12. The violations of the Federal Truth-in-Lending Act and the Texas Consumer Credit Code were material.

Misleading disclosures can be as much a violation of these Acts as the failure to disclose. Strict compliance with the technical requirements of the Federal Truth-in-Lending Act is to be observed. *Smith v. Chapman,* 614 F.2d 968 (5th Cir. 1980).

13. Under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, the Defendant is liable in statutory damages to the Plaintiffs for an amount equal to double the finance charge, but not to exceed the sum of $1,000.00. 15 U.S.C. § 1640(a)(1). In this case, Defendant is liable to Plaintiffs in the maximum sum of $1,000.00.

14. The liability under the Texas Consumer Credit Code for the instant violations is governed by Tex. Rev. Civ. Stat. Ann., Art. 5069 - 8.01, as it existed prior to a 1977 amendment. It provided for a civil penalty equal to twice the amount of interest or time price differential. In this case, that amount would be $16,203.68.

15. The damages to which Plaintiffs are entitled must be based upon the law that existed when this cause of action arose. Prior to the August 1977 amendment of Art. 5069 - 8.01, Plaintiffs could recover under *both* the Federal Truth-in-Lending Act and Art. 5069 - 8.01. *Cantrell v. First National Bank of Euless,* 560 S.W.2d 721, 729-730 (Tex. Civ. App.—Ft. Worth 1977, writ ref'd n.r.e.). The savings clause to the 1977 amendments exempts Chapter 6 actions pending on August 31, 1977. Section 3 of S.B. 939 (1977). Therefore, Plaintiffs are entitled to recover under both the Federal Truth-in-Lending Act and the Texas Consumer Credit Code. Plaintiffs are entitled to a judgment against the Defendant in the sum of $17,203.68.

16. Both the Federal Truth-in-Lending Act and the Texas Consumer Credit Code allow Plaintiffs to recover reasonable attorneys' fees in the case of any successful actions to enforce the Acts' provisions. 15 U.S.C. § 1640 (a)(2); Tex. Rev. Civ. Stat. Ann., Art. 5069 - 8.01.

17. Plaintiffs were represented in this case by Robert Tinnell and Michael Crowley. At the time of the trial, Mr. Tinnell had practiced law for 18 years and Mr. Crowley for five and a half years. Both have substantial experience and expertise in Truth-in-Lending cases and related litigation. Mr. Tinnell had expended 92 hours in the preparation and trial of this case, and Mr. Crowley, 64 hours. A reasonable fee in El Paso County, Texas, for attorneys of their skill and experience in this type of litigation is $60.00 an hour. Therefore, Mr. Tinnell is entitled to an attorney's fee of $5,520.00, and Mr. Crowley to a fee of $3,840.00, which will reasonably compensate them for their services through the trial of this cause. Should an appeal be taken, and should Plaintiffs prevail on such appeal, the Court will consider affidavits or further testimony regarding a reasonable fee for the additional legal services rendered to Plaintiffs by their attorneys on appeal.

18. Plaintiffs are entitled to a judgment against Defendant in the amount of $26,563.68, and to recover their costs.

SIGNED AND ENTERED this 29th day of July, 1981.

/s/ HARRY LEE HUDSPETH
Harry Lee Hudspeth
United States District Judge

Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,

NO. 82-1088

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT L. GUMM, d/b/a DESERT-AIRE MOBILE HOME STYLING AND SALES, INC. AND BOB'S MOBILE HOME SALES,
*Petitioner,*

v.

J. O. TURNER AND FERN LOUISE TURNER,
*Respondents.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD W. DUNBAR
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El Paso, Texas 79901
915/532-3638

*Attorneys for Respondents*

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

## QUESTIONS PRESENTED

The questions presented involve the application of the federal Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, and the Texas Consumer Credit Code, TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 *et seq.*, as both statutes were in force and effect in 1974. Subsequent amendment to the Texas Consumer Credit Code now disallows the recovery awarded against Petitioner. TEX. REV. CIV. STAT. ANN. Art. 5069-8.01(h) (Supp. 1982).

(1) Whether the trial court erred in imposing the statutory penalties arising under both the Truth In Lending Act and the Texas Consumer Credit Code for multiple acts of misconduct.

(2) Whether the trial court erred in holding that the choice-of-law provision was violative of the Texas Consumer Credit Code, and, therefore, invalid.

(3) Whether the trial court erred in finding that Petitioner was a creditor as defined by the Truth In Lending Act, 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s).

# TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | 1 |
| TABLE OF CONTENTS | II |
| TABLE OF AUTHORITIES | III |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR DENYING THE PETITION | 8 |
| I. The Imposition of Statutory Penalties Arising Under Both the Truth In Lending Act and The Texas Consumer Credit Code for Multiple Acts of Misconduct Involves Neither an Important Federal Question Nor the Need to Determine Congressional Intent | 8 |
| II. The Judicial Refusal to Give Effect to the Choice-of-Law Provision of the Subject Contract Correctly Enforced the Texas Consumer Credit Code | 13 |
| III. The Defendant Was a Creditor as Defined Under the Truth In Lending Act and Its Corresponding Regulations | 17 |
| CONCLUSION | 22 |
| CERTIFICATE OF SERVICE | 23 |
| APPENDIX | D-1 |

# TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457 (Tex. Civ. App.—Texarkana 1981, writ ref. n.r.e.) | 14 |
| *Cantrell v. First National Bank of Euless*, 560 S.W.2d 721 (Tex. Civ. App.—Ft. Worth 1977, writ ref. n.r.e.) | 10 |
| *Ford Motor Credit Co. v. Blocker*, 558 S.W.2d 493 (Tex. Civ. App.—El Paso 1977, writ ref. n.r.e.) | 9, 10 |
| *Hagans v. Levine*, 415 U.S. 528 (1974) | 7 |
| *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (1947) | 14 |
| *McDonald v. Savoy*, 501 S.W.2d 400 (Tex. Civ. App.—San Antonio 1973, no writ) | 10 |
| *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976) *cert. den.* 431 U.S. 929 (1977) | 4, 5, 21 |
| *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973) | 8 |
| *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) | 10 |
| *O. R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856 (Tex. Civ. App.—San Antonio 1974, writ ref. n.r.e.) | 16 |
| *Southwestern Ins. Co. v. Mannix*, 557 S.W.2d 755 (Tex. 1977) | 9 |
| *Sosa v. Fite*, 465 F.2d 1227 (5th Cir. 1972) | 9 |
| *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) | 7 |
| *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*, 642 F.2d 744 (5th Cir. 1981) | 14, 15, 16 |

| CONSTITUTIONAL PROVISIONS | |
|---|---|
| U. S. CONST. art. I, § 8, cl. 3 | 8 |
| U. S. CONST. art. VI, cl. 2 | 8 |

| FEDERAL STATUTES | |
|---|---|
| 15 U.S.C. § 1601 *et seq.* | *passim* |
| 15 U.S.C. § 1602(f) | 2, 7, 8, 17, 18 |
| 15 U.S.C. § 1605 | 11 |
| 15 U.S.C. § 1610 | 9 |
| 15 U.S.C. § 1633 | 9 |
| 15 U.S.C. § 1640 | 2, 3, 7 |
| 28 U.S.C. § 1254(1) | 2 |

Page

FEDERAL REGULATIONS

12 C.F.R. § 226.2(f) ..... 21
12 C.F.R. § 226.2(h) ..... 21
12 C.F.R. § 226.2(k) ..... 18
12 C.F.R. § 226.2(l) ..... 18
12 C.F.R. § 226.2(m) ..... 18
12 C.F.R. § 226.2(p) ..... 18
12 C.F.R. § 226.2(s) ..... 7, 18
12 C.F.R. § 226.2(jj) ..... 18
12 C.F.R. § 226.2(q) ..... 18
12 C.F.R. § 226.4(a)(6) ..... 11
12 C.F.R. § 226.12 ..... 9
Interpretation § 226.404 ..... 11

STATE STATUTES

TEX. BUS. & COMM. CODE § 1.105(a) ..... 14
TEX. BUS. & COMM. CODE § 9.105(2) ..... 20
TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 *et seq.* .. *passim*
TEX. REV. CIV. STAT. ANN. Art. 5069-6.01 ..... 7, 14, 22
TEX. REV. CIV. STAT. ANN. Art. 5069-6.02(3) ..... 13
TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(3) ..... 12
TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(5) ..... 12
TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6) .....12, 14, 15
TEX. REV. CIV. STAT. ANN. Art. 5069-8.01 ..... 3, 7, 9
Acts 1977, 65th Leg., p. 228, ch. 111, § 3 ..... 10

OTHER

Pederson & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 Sw. L. J. 755 (1980) ..... 16
Weintraub, *Commentary On The Conflict Of Laws* (2d ed. 1980) ..... 14
White & Summer, *Handbook Of The Law Under The Uniform Commercial Code* (2d ed. 1980) ..... 14

NO. 82-1088

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT L. GUMM, d/b/a DESERT-AIRE MOBILE HOME STYLING AND SALES, INC. AND BOB'S MOBILE HOME SALES,
*Petitioner,*

v.

J. O. TURNER AND FERN LOUISE TURNER,
*Respondents.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reported without opinion at 685 F.2d 1384 (1982), are set forth in Appendix A of the Petition for Writ of Certiorari previously filed by Robert L. Gumm, Defendant at the trial court and Petitioner herein. The judgment of the United States District Court for the Western District of Texas is set forth in Appendix B of said Petition. The Findings of Fact and Conclusions of Law of the District Court for the Western

District of Texas are set forth in Appendix C of said Petition. Central to the decisions of the courts below is the retail installment contract executed by the parties, reference to which is made in the Findings of Fact and Conclusions of Law as Plaintiffs' Exhibit 6 and 9. Exhibit 9 is the copy produced at trial by Petitioner, and is set forth in Appendix D, *infra*.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1982. Petition for rehearing was denied on September 30, 1982. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutes involved are the federal "Truth In Lending Act," 15 U.S.C. §§ 1601-1646, which although subsequently amended, provided in relevant part:

> § 1602(f).
>
> The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.
>
> § 1640(a).
>
> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of the individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under Part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

The "Texas Consumer Credit Code," TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 to 8.05, which although subsequently amended, provided in relevant part:

Art. 5069-8.01.

Any person who violates this Subtitle by contracting for, charging or receiving interest, time price differential or other charges which are greater than the amount authorized by this Subtitle, or by failing to perform any duty specifically imposed on him by any provision of this Subtitle, shall forfeit to the obligor

twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorney's fees fixed by the court, provided that there shall be no penalty for violation which results from an accidental and bona fide error.

## STATEMENT OF THE CASE

On November 1, 1974, Robert L. Gumm, doing business as Bob's Mobile Home Sales, executed a retail installment contract with J. O. and Fern Louise Turner for the purchase, on credit terms, of a mobile home. Suit was brought upon this contract on October 31, 1975.

Contrary to what Petitioner has argued in the courts below, and flatly reasserts in his Petition for Writ of Certiorari, the subject contract was by and between Mr. Gumm (hereinafter also referred to as "Defendant") and the Turners (hereinafter also referred to as "Plaintiffs"). The contract *was not* entered into by Plaintiffs and the Security National Bank of Roswell, New Mexico. The subject contract is not a loan agreement between Plaintiffs and the bank; it is a contract between Defendant as Seller and Plaintiffs as Buyers. The bank was the assignee of the contract between the parties, and neither the contract itself nor the record below can alter Defendant's position as an indispensable party to the agreement. Under no reading of the contract or the record can Defendant validly claim that he was not the seller, assignor and ultimately a creditor in the transaction with Plaintiffs.[1]

1. This is not to say that under the Truth In Lending Act's definition of "creditor" Security National Bank also could not have been adjudged as a creditor had it been joined as a party. See *Meyers v. Clearview Dodge, Sales, Inc.*, 539 F.2d 511, 514. (5th Cir. 1976) *cert. den.* 431 U.S. 929 (1977) which also contains a summary of how vehicle dealers arrange for the extension of credit by financial

Both Plaintiffs and Defendant are residents of the State of Texas, and both parties signed the contract in Texas. The mobile home was delivered to Plaintiffs in Texas, and the certificate of title was issued by the State of Texas. On November 7, 1974, according to the contract produced at trial by Defendant, Defendant assigned the contract to the Roswell, New Mexico bank. See Appendix D. No promissory note or other obligation ever was executed by the Plaintiffs in favor of the bank. The operative instrument in the case at bar is the retail installment contract of November 1, 1974, and it forms the only basis for any indebtedness. Defendant attempts to obscure his status, as a party to the contract, and a creditor, by claiming that the actual parties to the contract were Plaintiffs and the Roswell bank. This simply is not the case.

In the summer and fall of 1974 Defendant experienced difficulty in finding a lending institution which would purchase the obligation of Plaintiffs. Defendant testified that during this time period he sold and assigned the retail contracts of his customers to Bassett National Bank of El Paso, Texas; Mutual Building & Loan of Las Cruces, New Mexico; and First State Savings & Loan of El Paso. He also maintained a business relationship with Delta Corporation of America, a mobile home service company, which assisted Defendant in selling his installment sales contracts to financial institutions. Initially, Mutual Building & Loan was thought to have been prepared to purchase the Plaintiffs' contract, and a form contract, acceptable to Mutual, was signed by Plaintiffs and Defendant.

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institutions. One notable difference between the instant cause and the *Meyers* fact situation is that credit approval by the subsequent assignee was a condition to the *Meyers* transaction, while in the case at bar, the contract purported to be valid and binding on its face.

The failure of Mutual to purchase the contract caused considerable difficulty in that the mobile home already had been delivered to Plaintiffs. Defendant was obligated to extend credit under the Mutual contract, but either could not or would not perform. When the potential purchaser of the obligation refused to buy the installment contract, Petitioner and his service company sought other institutional purchasers. These sought-after institutions each had particular requirements, including the use of form contracts which Defendant as Seller and Plaintiffs as Buyers would be required to sign. As a result, Plaintiffs were asked to sign a variety of form contracts which presumably then were offered to various financial institutions by the mobile home service company assisting Defendant.

The record is unclear as to how many contracts were signed or what state law provisions were contained therein.

The desire to find a financial institution after the delivery of the mobile home led Defendant to execute and assign a retail installment contract which violated federal and state disclosure statutes. Texas disclosures were abandoned in the effort to locate an assignee. The Plaintiffs always assumed, and so testified, that the service company representative was from Bob's Mobile Homes. They had no understanding of the service company's role or the complex series of signings that Defendant caused them to undergo. They never met or discussed a loan with any New Mexico bank personnel. They merely signed what was placed in front of them in the hopes of keeping their mobile home. It is small wonder that the Fifth Circuit referred to the transaction as "a sticky deal." Appendix A-4.

The relationship which Defendant maintained with Delta Corporation of America was equally convoluted. Defendant claimed at trial that he received no participation fee from Delta, and that Delta later went out of business. As the trial court found, Defendant was entitled to receive such a fee upon assigning the contract, and in fact anticipated receiving the fee. Appendix C-5. Defendant's failure to receive this fee, for whatevr reason, cannot absolve him from being a creditor.

Defendant neither pled nor proved any *bona fide* error defense provided under the Truth In Lending Act, 15 U.S.C. § 1640, or the Texas Consumer Credit Code, TEX. REV. CIV. STAT. ANN. Art. 5069-8.01.

After trial on February 26, 1981, the court found that Defendant committed nine distinct violations of the statutes involved—two under the federal act and seven under the state code—and imposed the respective penalties authorized by each statute. Appendix C-5-7. The court found that Defendant was a "creditor" as defined by 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s), and a "retail seller" as defined by TEX. REV. CIV. STAT. ANN. Art. 5069-6.01(d). Pendent jurisdiction was exercised over the state claim under the authority of *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) and *Hagans v. Levine,* 415 U.S. 528, 550 (1974). Appendix C-4.

Plaintiffs were awarded judgment in the amount of $1,000 under federal law and $16,203.68 under state law, the latter being computed as "twice the amount of interest or time price differential". TEX. REV. CIV. STAT. ANN. Art. 5069-8.01. Appendix C-8. Attorney's fees were set at $9,360 under both the federal and state statutes. Appendix C-9.

The Fifth Circuit, *per curiam*, affirmed the trial court, finding Defendant to be a creditor under 15 U.S.C. § 1602(f) and rejecting Defendant's claim that recovery under both the federal and state law was impermissible. Appendix A-8.

## REASONS FOR DENYING THE PETITION

### I. THE IMPOSITION OF STATUTORY PENALTIES ARISING UNDER BOTH THE TRUTH IN LENDING ACTS AND THE TEXAS CONSUMER CREDIT CODE FOR MULTIPLE ACTS OF MISCONDUCT INVOLVES NEITHER AN IMPORTANT FEDERAL QUESTION NOR THE NEED TO DETERMINE CONGRESSIONAL INTENT.

### A.

The courts below did not err in permitting the imposition of penalties under both state and federal law. The passage of the Truth In Lending Act and the promulgation of its corresponding regulations was an exercise of "the power granted to Congress under the Commerce Clause." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 379 (1973). Defendant does not argue that either the Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, or the Supremacy Clause, U.S. CONST. art. VI, cl. 2, are threatened by a state's passage of consumer protection laws for its citizenry. Nor does he argue that some procedural or substantive federal right is in need of protection.

Defendant points to the "unfortunate" fact that both the state and national governments "acted independently" of one another in extending protection to consumers, but

this, without more, does not rise to a federal question. Petition for Writ of Certiorari, 7-9. He speaks of Congress not intending dual recovery, yet Congress has done nothing to limit the states' various statutory schemes. Indeed, the Truth In Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, tit. VI, 94 Stat. 168 (1980) takes no action against state consumer protection laws.

Moreover, the Congress always has recognized that the Truth In Lending Act "does not annul, alter or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions . . ." except to the extent state law is inconsistent with federal law. 15 U.S.C. § 1610 (1968). See also 15 U.S.C. § 1610 (1980). It would appear that any intent manifested by the Congress is inapposite to that inferred by Defendant.

The Congress, rather than foreclosing state action, has permitted the states to apply to the Federal Reserve Board for exmption of any class of transactions from the Truth In Lending Act. 15 U.S.C. § 1633; 12 C.F.R. § 226.12. The Fifth Circuit in *Sosa v. Fite*, 465 F.2d 1227 (5th Cir. 1972) held that the mere passage of a state act did not result in exemption, and only the Federal Reserve Board was empowered to grant an exemption. No exemption was granted to the State of Texas.

Texas courts continued to grant recovery under both the state and federal acts until the Texas Legislature limited recovery by amending the Code in 1977. TEX. REV. CIV. STAT. ANN. Art. 5069-8.01(h). See *Southwestern Ins. Co. v. Mannix*, 557 S.W.2d 755 (Tex. 1977); *Ford Motor Credit Co. v. Blocker*, 558 S.W.2d

493 (Tex. Civ. App.—El Paso 1977, writ ref. n.r.e.); *McDonald v. Savoy*, 501 S.W.2d 400 (Tex. Civ. App.—San Antonio 1973, no writ); *Cantrell v. First National Bank of Euless*, 560 S.W.2d 721 (Tex. Civ. App.—Ft. Worth 1977, writ ref. n.r.e.).

In limiting the application of penalties, the Texas Legislature expressly provided that the limitation would not apply to any pending action arising from a transaction entered into prior to July 1, 1976. Acts 1977, 65th Leg., p. 228, ch. 111 § 3. The case at bar involves such a transaction.

The Texas Legislature and the Federal Congress each have engaged in lawmaking which comports with basic federalism. The various states have exercised their residuary powers of regulation in a flexible manner, having been encouraged by a Congress which not only recognizes the right to so legislate, but which permits state exemption from the federal statutory scheme. Defendant argues that the relationship between state and federal consumer law must be "resolved," implying that some fundamental constitutional defect (which he cannot articulate) threatens the system. Yet the very strength of the federal system is to allow the states, within constitutional bounds, to regulate their affairs and to address local problems.[2]

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2. The ability of the states to regulate consumer and credit affairs is reminiscent of Mr. Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court

Congress is of the apparent opinion that consumer protection is a problem worthy of state concern, and has not placed any impediment to the states' exercise of this power.

The State of Texas allowed the dual imposition of penalties, but later withdrew this method of enforcing its regulation of consumer credit. Either approach is reasonable, and violates no federal constitutional precept. No federally protected right is in need of vindication in the case at bar.

**B.**

Defendant argues that a creditor regulated by the Truth In Lending Act and the Texas Consumer Credit Code will often, by the same conduct, violate both statutes. Double recovery, this argument goes, is unfair and unnecessarily punitive because the creditor engaged in only one act of misconduct. Petition for Writ of Certiorari, 7.

This argument is inapplicable to the conduct of Bob's Mobile Home Sales. Several misdeeds, each of which may be separately identified, were committed.

Defendant failed to include the cost of comprehensive physical damage insurance coverage in the finance charge thereby violating 15 U.S.C. § 1605 and 12 C.F.R. § 226.4(a)(6). Also not included in the finance charge was the cost of a separate type of insurance, Vendor's Single Interest insurance coverage. This inclusion violated 12 C.F.R. § 226.4(a)(6) and Interpretation § 226.404

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applicable to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

in that the insurance company, in the case at hand, did not waive its subrogation rights.

Each insurance violation would support recovery under the Truth In Lending Act. In both of the Truth In Lending violations the separate insurance coverage was included in the "amount financed" rather than the "finance charge".

Some of the violations of the state code concerned insurance disclosure problems, but they are not identical, as Defendant suggests, to the federal violations. Defendant failed to clearly and conspicuously disclose that either the physical damage insurance or the Vendor's Single Interest insurance was required in connection with the transaction. TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(3) and (5). Defendant failed to disclose that the physical damage insurance was sold at rates not fixed or approved by the Texas State Board of Insurance as required by TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(3) and (5). The same state statutory provision was violated by failing to disclose the cost of the physical damage insurance.

The remaining state code violations are unrelated to insurance coverage. Defendant's contract provided for waiver of any claim against Seller based upon any unwritten modification of the contract. TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6). The retail installment agreement further provides for the waiver of any claim under the laws of Texas by requiring that the contract "shall be governed by the laws of the State of New Mexico." Appendix D. This term violates TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6).

The final violation is concerned with the Defendant's failure to deliver or mail to the Plaintiffs a signed copy

of the contract as required by TEX. REV. CIV. STAT. ANN. Art. 5069-6.02(3). Defendant, for reasons best known to himself, went to great lengths at trial to prove that Plaintiffs never received a signed copy of the contract. This trial strategy presumably was undertaken in the mistaken belief that the contract forwarded to the retail purchasers is not the instrument upon which a consumer suit is founded.

In summary, Defendant's premise that Congressional intent is in need of interpretation is unvalid. His view that an important federal question must be addressed by this Court is misplaced. Finally, his argument that the dual imposition of state and federal penalties leaves a creditor open to unnecessarily punitive fines does not mesh with the facts at hand.

## II. THE JUDICIAL REFUSAL TO GIVE EFFECT TO THE CHOICE-OF-LAW PROVISION OF THE SUBJECT CONTRACT CORRECTLY ENFORCED THE TEXAS CONSUMER CREDIT CODE.

Defendant, in urging that Texas law be ignored, once again engages in the fiction that the subject contract was entered into between the New Mexico bank and Plaintiffs. Defendant's status as the Seller is explained away in this argument by claiming that Defendant entered into a separate contract of sale. A reading of the retail installment contract clearly establishes this "two contract" theory as incorrect. Appendix D.

In making his argument, Defendant refers to basic contract law regarding offer and acceptance, and cites the "reasonable relationship" test which governs the general

law of contracts. Weintraub, *Commentary on the Conflict of Laws*, § 7.3C (2d ed. 1980). See also the Uniform Commercial Code § 1-105(1) (1972); TEX. BUS. & COMM. CODE § 1.105(a) (hereinafter referred to as "Texas U.C.C."). Defendant embraces the proposition that the parties to a contract may designate which state's law will govern their agreement—a true statement, in and of itself, but inapplicable to a regulated consumer transaction.

Defendant ignores the Texas Consumer Credit Code and the express prohibition against waiver. TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6). While persons not engaging in a "consumer transaction," as defined by the Code, TEX. REV. CIV. STAT. ANN. Art. 5069-6.01, may include a choice of law provision, such a provision is unenforceable in a regulated transaction. The Texas Uniform Commercial Code, which permits choice of law clauses in normal commercial transactions, is overridden by Texas Consumer Credit Code. See White & Summers, *Handbook of the Law Under the Uniform Commercial Code* (2d ed. 1980), 7. The Consumer Credit Code forms a part of the "fundamental public policy of the State of Texas," *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram*, 642 F.2d 744, 753 n. 13 (5th Cir. 1981) (hereinafter referred to as *"Woods-Tucker"*), and as such cannot be bartered away in a form contract. Texas courts have long recognized that the common law right to specify the place of performance may be overridden by public policy, *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461 (Tex. Civ. App.—Texarkana 1981, writ ref. n.r.e.) citing *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (1947).

*Woods-Tucker* dealt with the contractual choice of the law of Mississippi in an agreement between a Texas partnership and a Mississippi corporation. The usury laws of Texas were more advantageous to the Texas debtor than were the laws of Mississippi, and the debtor, therefore, sought to avoid the agreed upon choice of law. The Fifth Circuit held that the parties were free to avoid the usury laws of Texas so long as there was a reasonable relation between the transaction and Mississippi, and, further, that the choice was not a contrivance to avoid Texas law.

*Woods-Tucker* involved merchants unregulated by the Consumer Credit Code. At issue was the application of the Texas usury laws which comprise Subtitle One of Title 79 of the Texas Revised Civil Statutes, TEX. REV. CIV. STAT. ANN. Art. 5069-1.01-1.08. This subtitle contains no express prohibition against waiver, unlike the Consumer Credit Code which comprises Subtitle Two of Title 79 of the Texas Revised Civil Statutes, TEX. REV. CIV. STAT. ANN. Art 5069-2.01-8.06, and does contain such a prohibition. TEX. REV. CIV. STAT. ANN. Art 5069-6.05. Given this prohibition it cannot be said that the Texas U.C.C. allows choice of law provisions in consumer contracts. Non-waiver is fundamental public policy. The entire purpose of the Consumer Credit Code would be subverted if lenders, assignees, and mobile home service companies, many of which are out of state corporations, could insert choice of law provisions in consumer contracts. A "reasonable relation" might well be established by the foreign domicile, the execution by the lender in its domicile, and payment by the borrower in the foreign jurisdiction. In short, it would not be difficult for regional or national lenders, assignees or service companies to satisfy the "reasonable relation" test. Perhaps,

it was just such a likelihood that caused the Texas Legislature to enact the non-waiver provision in the Consumer Credit Code. It also is perhaps why the Fifth Circuit favorably quoted the view that, given a reasonable relationship, a choice of law will be honored *provided* the choice is neither a contrivance nor in contravention of State public policy. *Woods-Tucker, supra* at 751, quoting Pederson & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act,* 34 Sw. L. J. 755, 766 (1980).

*Woods-Tucker* also differs factually from the case at bar. The contracting parties in the case at hand are both Texans who signed the agreement in Texas to convey title to a mobile home. Title then was registered in Texas. Even Delta Corporation was a Texas corporation. The assignee was a New Mexico corporation, but the parties to the contract were Texas residents. The reasonable relation is not present in the instant cause, even if the fundamental public policy of Texas were absent.

In urging the adoption of the New Mexico disclosure laws to a Texas transaction, Defendant has made the additional argument that he didn't prepare the contract, and that this should absolve him from any liability arising thereunder. Defendant apparently seeks immunity by virtue of his status as user, not preparer, of the contract. *O. R. Mitchell Motors, Inc. v. Bell,* 528 S.W.2d 856 (Tex. Civ. App.—San Antonio 1974, writ ref'd. n.r.e.) effectively negates this position: the duty of compliance rests with the seller, even if the contract is not of its own preparation. Defendant has confused the literal meaning of "making a contract" (i.e., the actual act of physically creating the contract form) with execution of the contract

by the parties. Defendant has never denied he was an executing party to the contract, and, indeed, in his Brief acknowledges assignment of the same to the Security Bank. Assignment presupposes execution by a party to obtain a contractual right that may then be assigned.

## III. THE DEFENDANT WAS A CREDITOR AS DEFINED UNDER THE TRUTH IN LENDING ACT AND ITS CORRESPONDING REGULATIONS.

Defendant's final argument for the granting of the writ of certiorari again attempts to remove Defendant from the ambit of the subject contract. His Petition states that his involvement was at best ministerial, and then goes on to suggest that he was "an uninvolved party." Petition for Writ of Certiorari, 15. He urges that he had no involvement with the New Mexico bank. Petition for Writ of Certiorari, 16. Plaintiffs would respectfully point out that Defendant is a "creditor" under the Truth In Lending Act. 15 U.S.C. § 1602(f) states that the term "creditor" refers to those ". . . who regularly extend, or arrange for the extension of credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise." As amended by Public Law 93-495 in 1974, effective upon the expiration of one year after October 28, 1974, the definition was to be as follows:

> "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which payment of a finance charge is or may be required, whether in connection with laws, sales of property or service, or otherwise . . ."

12 C.F.R. 226.2(s) (1980)[3] defines *"creditor" as one "who in the ordinary course of business regularly extends or arranges for the extension of consumer credit* or offers to extend or arrange for the extension of such credit . . ."

12 C.F.R. § 226.2(p)[4] defines "consumer credit" as ". . . credit offered or extended to a natural person in which the . . . property . . . which is the subject of the transaction is primarily for personal, family, household or agricultural purposes . . ." 226.2(q)[5] defines "credit" as ". . . the right granted by a creditor to a consumer to . . . purchase property . . . and defer payment therefor . . ." 226.2(jj) requires that "[u]nless the context indicates otherwise, 'credit' shall be construed to mean 'consumer credit'."

Applying the definitions found in the statute and the regulations, it is clear Defendant ". . . in the ordinary course of business extended . . . consumer credit."

The trial court found that Plaintiffs purchased the Monte Carlo mobile home for personal, family and/or household purposes. Appendix C-2. Further testimony established that a Mr. Bob King contacted Plaintiffs on behalf of Defendant on several occasions with Defendant's paperwork, to be signed by Plaintiffs. Appendix C-3. A copy of the contract received by Plaintiffs in the mail was admitted into evidence. Appendix C-4. Defendant's testimony indicated he was and is in the mobile home

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3. Formerly 12 C.F.R. § 226.2(m) (1975); see also, Truth In Lending Act, § 103(f), 15 U.S.C. § 1602(f) (1976).

4. Formerly 12 C.F.R. § 226.2(k).

5. Formerly 12 C.F.R. § 226.2(l).

business. He indicated he used retail installment contracts similar to the subject contract frequently in his business and sold the contracts as a matter of course to assignees. He was acquainted with and used Texas form contracts in his business.

The contract received by Plaintiffs recites that Plaintiffs are "Buyer (and Co-Buyer)." It indicates Seller is Defendant. It indicates a cash price (line 1), other charges (line 4), total unpaid balance/amount financed (line 5), and the finance charge (line 6) for deferring payment of the amount financed. Line 10 defines Plaintiffs' obligation to Seller regarding amount and frequency of future payments. These items constitute the extension of credit to Plaintiffs by Defendant. Nowhere on items 1 through 10 is either the word "assignee" or the Security National Bank of Roswell, New Mexico mentioned. The contract purports to be disclosing terms of the transaction and in so doing designates the Seller, Bob's Mobile Home Sales, as the one financing the unpaid balance of $12,662 (line 5) for a charge of $8,101.84 (line 6). By the terms of the contract the finance charge was imposed at the time the credit was extended, the payments were to be made in more than four installments, and the amount financed was less than $25,000. Thus, the past and present definitions of "creditor" were met.

The contract on its face establishes that Defendant is the Owner of the Contract, and is therefore, entitled to receive all installment payments. Under any definition of the word "creditor", from the Law Merchant to the Uniform Commercial Code and the Truth In Lending Act, Defendant qualifies as such. Quite simply, he is the person to whom the obligation was owed. The contract

cannot be read as saying anything other than that the Defendant himself extended credit to Plaintiffs.

The fact that he had planned to assign the contract, as he did in his other installment sales, cannot alter his status as a creditor. An examination of the contract also establishes that the Security National Bank of Roswell never intended to be the Seller or the extender of credit, but to act only as an assignee. This could not have prevented the bank from being adjudged as a "creditor" itself under the Truth In Lending Act which recognizes multiple creditors. The Bank purchased the right or interest of another: in this case, the right to collect money in installments from the Turners. The Bank was a purchaser of chattel paper. Defendant created the monetary obligation with the Turners and sold it to the Bank. TEX. BUS. & COMM. CODE § 9.105(2). Consequently, the Bank required the Defendant to warrant, in the paragraph entitled "Assignment", that the Contract was genuine, legal, valid and enforceable, that all disclosures were made, and, among other things, that the Seller "has no knowledge of any fact which would impair the validity or value of the contract."

The Bank, as an assignee, did not deal with Plaintiffs. No note, loan application, or other instrument of similar nature from the Bank was signed by Plaintiffs.

Defendant has largely ignored the contract and the role it imposes upon him. The transaction is governed by this contract and it is the basis for all indebtedness, yet Defendant argues that it was an afterthought, containing terms which don't mean what they say. The Court is presented with that rare case where the vehicle dealer,

and not the purchaser, claims to not understand or appreciate the terms of the contract.

In so doing, Defendant has sought to shift liability to Delta Corporation, apparently in the hope that the trial court would find that Mr. Gumm was a bystander, at best, or a third party beneficiary, at worst. Appendix A-7, footnote 5. Much of Defendant's testimony centered on Mr. Bob King of Delta Corporation activities: how Mr. King and not Defendant proffered various contracts to the Turners; how Defendant did not know the terms of the contracts, especially the New Mexico contract; how Defendant viewed the transaction as a "cash transaction"; and how Defendant did not receive any placement fee or other unearned remuneration. This testimony might form the basis of an argument that Mr. King was an arranger of credit,[6] but it does nothing to alter Defendant's role as a creditor or arranger of credit.

The cases interpreting the definition of "creditor" in Truth In Lending actions have long noted that the statute expands the traditional definition of creditor:

> ". . . these definitions increase the number of persons generally responsible for making truth in lending disclosures by categorizing as creditors additional persons . . . who did not fit the traditional definition of 'creditor'. Therefore, in some consumer credit transactions, there are multiple 'creditors', a credit arranger and a credit extender . . ." *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-15 (5th Cir. 1976).

6. Regulation Z, 226.2(h) (1980), 12 C.F.R. § 226.2(h) (1980) and former Regulation Z, 226.2(f) (1975), 12 C.F.R. § 226.2(f) (1975), contains language indicating that an arranger receives a fee or compensation or has knowledge of the credit terms and participates in the preparation of the contract.

While some evidence was presented by Defendant that Mr. King was an arranger of credit (or in Plaintiffs' view, an agent of Defendant), nothing was presented which took Defendant outside the traditional or statutory definition of "creditor". A creditor is merely one to whom an obligation is owed, and Bob's Mobile Home Sales was the party to whom the debt was owed. He also was contractually entitled to receive a participation fee and anticipated the receipt of same. Appendix C-5. He was directly involved and had a stake in the contract.

Plaintiffs also would state that the argument and the testimony summarized above supports the finding that Defendant was a "retail seller" as defined by the Texas Consumer Credit Code. TEX. REV. CIV. STAT. ANN. Art. 5069-6.01(d).

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD W. DUNBAR
MICHAEL C. CROWLEY
1808 State National Plaza
El Paso, Texas 79901
915/532-3638

## CERTIFICATE OF SERVICE

I, EDWARD W. DUNBAR, as Counsel of record for Respondents and a member of the Bar of the Supreme Court of the United States of America, hereby certify that three true and correct copies of the foregoing Response to the Petition for Writ of Certiorari have been served upon James F. Scherr, 425 Myrtle Street, El Paso, Texas 79901, in accordance with Rule 33 of the Supreme Court Rules, by placing such copies in the United States Mail. All Parties required to be served have been served.

EDWARD W. DUNBAR

Form Owen 2

# NEW MEXICO SECURITY AGREEMENT AND RETAIL INSTALLMENT CONTRACT DISCLOSURE STATEMENT

ACCT. NO. _____ DATE November 1, 1974

PLAINTIFF'S EXHIBIT 9 2-26-87

| Buyer (and Co-Buyer) - Name and Address (Include County and Zip Code) | Seller - Name and Address (Indicate Seller's |
|---|---|
| J.O. & FERN LOUISE TURNER<br>P.O. Box 177<br>Dell City, Texas - 79837 | BOB'S MOBILE HOME SALES<br>10180 Dyer Street<br>El Paso, Texas 79924 |

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally) hereby purchases from Seller upon the terms and conditions on the face and reverse sides hereof the Motor Vehicle (and other personal property) described below, complete with standard attachments and equipment and other special equipment (all of which is hereinafter called the "Property"), delivery and acceptance of which in good order hereby are acknowledged by Buyer.

| New or Used | Year and Make | Series | Body Style | No. Cyl. | If Truck, Ton Capacity | Manufacturer's Serial Number | Present Odometer Reading |
|---|---|---|---|---|---|---|---|
| USED | 73 Monte Carlo | SHR | 80X14 | MOBILE HOME | | 773480-81559 | |

INCLUDING: ☐ Air Conditioner ☐ Radio ☐ Stereo ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows

Use for Which Purchased: ☐ Personal ☐ Business ☐ Agricultural

## DETAILS OF TRANSACTION
(INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)

| | | |
|---|---|---|
| (1) Cash Price* | | $ 13,000.00 (1) |
| Cash Down Payment | $ 1,500.00 | |
| Trade in (See Opposite) | $ None | |
| (2) Total Down Payment | | $ 1,500.00 (2) |
| (3) Unpaid Balance of Cash Price (Difference between Items 1 & 2) | | $ 11,500.00 (3) |
| (4) Other Charges | | |
| Optional Insurance (Line (e) Opposite) | $ 644.00 | |
| Official Fees | $ | |
| Taxes (Not included in Cash Price) | $ 520.00 | |
| License, Title & Registration Fees | $ 98.00 | |
| Total Other Charges | | $ 1,162.00 (4) |
| (5) Unpaid Balance - Amount Financed* | | $ 12,662.00 (5) |
| (6) FINANCE CHARGE | | $ 8,101.84 (6) |
| (7) TOTAL of PAYMENTS* (Sum of Items 5 & 6) | | $ 20,763.84 (7) |
| (8) Deferred Payment Price (Sum of Items 1, 4, & 6) | | $ 22,263.84 (8) |
| (9) ANNUAL PERCENTAGE RATE | | 13.49 %(9) |

(10) Payment Schedule: Buyer hereby promises to pay to Seller the TOTAL of PAYMENTS (Item 7 above) in 96 payments, the first payment in the amount of $ 216.29 being due on December 15, 1974, and subsequent payments in like amounts on the same day of each successive month thereafter, with the final payment of $ 216.29 being due on November 15, 1982.

(11) BALLOON PAYMENT(S) AND PICKUP PAYMENT(S)

$ NONE on _____, 19____;

$ NONE on _____, 19____

(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment, and list amounts of any pickup payments.) A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(12) DELINQUENCY CHARGES: Buyer hereby agrees to pay a delinquency charge on each payment in default for more than 10 days in the amount of 5% thereof or $5.00 whichever is less, plus attorneys' fees and court costs, incurred by Seller in effecting collection.

(13) SECURITY INTEREST: Seller shall have a security interest under the Uniform Commercial Code in the Property and in the proceeds thereof to secure the payment in cash of the TOTAL of PAYMENTS and all other amounts due or to become due hereunder, and this contract shall serve as a security agreement.

(14) PREPAYMENT REBATE: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final payment hereunder, and, if he does so shall receive a rebate of the unearned portion of the Finance Charge computed under the rule of 78ths subject to retention by Seller of a maximum Finance Charge of $25.00. No rebate will be made if the amount thereof is less than $1.00.

(15) ADDITIONAL TERMS AND CONDITIONS: The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

## DESCRIPTION OF TRADE IN

NONE (Year and Make) — $ NONE (Gross Allowance)

(Serial Number) — $ (Amount Owing)

## OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) **Automobile Physical Damage Insurance:** Coverages checked below for a term of 24 months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof, payable to Buyer or Seller as interests may appear:

☒ Comprehensive ☐ Fire - Theft & Combined Additional Coverage

☐ $ _____ Deductible Collision ☐ Towing & Labor Costs ($25.00 Limit)

$ 526.00 (a)

(b) Credit Life Insurance — $ None (b)
None (Insured Person)

(c) Accident and Health Insurance — $ None (c)
None (Insured Person)

(d) Other Optional Insurance VSI (Specify Kind) — $ 18.00 (d)

(e) Total Cost of Optional Insurance — $ 544.00 (e)

NOTICE: (1) You are not required to obtain the Credit Life and/or Accident and Health Insurance and such is not a factor in the Seller's approval of this credit. (2) You have the right to choose the person through whom the Automobile Physical Damage Insurance required under this contract is to be obtained. ACKNOWLEDGING the foregoing, BUYER requests and authorizes SELLER to obtain each insurance coverage for which an amount is included above.

Buyer _____ Date Nov. 1, 1974

Spouse _____ Date Nov. 1, 1974

(Cost of Insurance to be included only if signed by Buyer)

### NOTICE TO BUYER

1. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES.
2. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN.

BUYER ACKNOWLEDGES RECEIPT OF A TRUE AND COMPLETELY FILLED-IN COPY OF THIS CONTRACT AT THE TIME OF SIGNING.

Buyer Sign _____

Spouse Sign _____

### NOTICE TO BUYER

LIABILITY INSURANCE FOR BODILY INJURY OR PROPERTY DAMAGE CAUSED TO OTHERS IS NOT PROVIDED WITH THIS AGREEMENT. IF YOU DESIRE LIABILITY INSURANCE COVERAGE, YOU SHOULD OBTAIN SUCH COVERAGE FROM AN AGENT OF YOUR CHOICE.

The foregoing contract hereby is accepted by the Seller and assigned to SECURITY NATIONAL BANK OF ROSWELL in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller BOB'S MOBILE HOME SALES

By _____ Title _____

### * INCONSISTENT STATE DISCLOSURES

The terms of disclosure set forth above in the Details of Transaction are made in compliance with the Federal Truth in Lending Act. The following items required by the New Mexico Motor Vehicle Sales Finance Act differ only with respect to terminology and are disclosed at the item numbers indicated: Cash Sale Price at Item (1); Principal Balance at Item (5); and Time Balance at Item (7).

Rev. 6/73

Seller's Copy

## ADDITIONAL TERMS AND CONDITIONS

**16. ASSIGNMENT**
The original Seller may assign this contract and his assignee shall acquire all of his interest in the contract and the Property and shall be invested to all the rights and privileges of Seller hereunder. Buyer hereby agrees not to set up against any assignee any claim or defense of any kind whatsoever, which he might have against the Seller. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder hereof and the original Seller shall not be the agent of the holder for the transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property without the prior agreement of the holder and payment of all lawful fees.

**17. USE OF PROPERTY – WARRANTIES**
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.

**18. RISK OF LOSS – INSURANCE**
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing payments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to the rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, if any. Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

**19. DEFAULT**
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Seller will give Buyer reasonable notice of the time and place of any public sale or of the time after which any private sale is to be made. The requirement of reasonable notice shall be met if such notice is mailed, postage prepaid, to the address of Buyer shown at the beginning of this Agreement at least five (5) days before the time of the sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency insofar as allowed by law. Any personalty in or attached to the Property when repossessed, may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay attorneys' fees of 15% of the amount then due plus court costs incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

**20. GENERAL**
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state of New Mexico.

## GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guarantees the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with attorneys' fees of 15% of the amount then due if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law, and waives all setoffs and counterclaims.

Guarantor _____ Address _____

Guarantor _____ Address _____

## ASSIGNMENT

The Seller named on the face of this contract sells, assigns, and transfers to SECURITY NATIONAL BANK OF ROSWELL (hereinafter called "Bank") his, its or their entire right, title and interest in and to the within contract and the Property described therein and authorizes Bank to do every act and thing necessary to collect and discharge obligations arising out of or incident to said contract and assignment, in order to induce Bank to accept assignment of the contract, the Seller warrants that: The contract, and guaranty if any, are genuine, legally valid and enforceable and arose from the sale of said Property; said Property is as represented to the Buyer named therein; the within contract was complete in all respects and Seller made all disclosures required by law, including the disclosures required by Regulation "Z" (Truth in Lending) prior to the execution thereof by Buyer; the Buyer is not a minor, has capacity to contract and paid the down payment stated in the contract with his own funds, all statements made by or on behalf of the Buyer and furnished to Bank by the Seller are true to the best of the Seller's knowledge and belief, and the Seller has no knowledge of any fact that would impair the validity or value of the contract; title to said Property is vested in the Seller free of all liens and encumbrances and the Seller has the right to assign said title; and a certificate of title so and properly showing a lien or encumbrance for the benefit of Bank or the Seller has been or will be applied for forthwith if permitted by law. If there is any breach, actual or alleged, or regardless of who may assert same, of any of the foregoing warranties, without regard to the Seller's knowledge or lack of knowledge with respect thereto, or Bank's reliance thereon, or the truth of same, the Seller hereby agrees unconditionally to purchase said contract from Bank, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default. Seller further agrees that in event Buyer or any other person makes a claim against Bank alleging facts which, if true, would constitute a breach of any of the foregoing warranties, Seller shall assume the defense of such claims and shall indemnify and save Bank harmless from all loss, cost and expenses arising therefrom. In addition, this assignment includes the provisions of the paragraph signed by the Seller below, provided that if none of the paragraphs below has been signed by Seller, this assignment shall not include any of the provisions of the paragraphs below. The liability of the Seller shall not be affected by any extension, renewal or other change in the time of payments of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for payment thereof or the release or non-perfection of any security thereunder. Bank shall not be bound to exhaust its recourse against the Buyer or any other person or any security Bank may at any time have before being entitled to payment from the Seller hereunder. The Seller waives notice of the acceptance of this assignment and notices of non-payment and non-performance of the contract and any other notices required by law and waives all setoffs and counterclaims. This assignment shall become effective upon delivery of the within contract to Bank or upon Bank's payment of the purchase price therefor whichever first occurs.

TO: SECURITY NATIONAL BANK OF ROSWELL
WITHOUT RECOURSE AGREEMENT
FOR VALUE RECEIVED, and pursuant to terms of assignment [illegible] the undersigned [illegible] and assigns all of its right, title and interest in and to the within contract and the property described therein, and authorizes and directs the Seller therein named to pay all sums due and to become due thereunder to the order of SECURITY NATIONAL BANK OF ROSWELL, ROSWELL, N.M. (HEREIN CALLED ASSIGNEE), and the undersigned hereby warrants and agrees with Assignee that the within contract and the property described therein are free and clear of all liens, claims and encumbrances of every kind and nature whatsoever, except [illegible] and that the undersigned will warrant and defend the same against the claims and demands of all persons whomsoever. The undersigned represents that the within contract was executed by the Buyer therein named and that the property described therein was sold to said Buyer in accordance with the terms and conditions of said contract, and that all representations made by the undersigned in connection with the within contract are true and correct. The undersigned hereby guarantees the payment of the within contract and all sums due thereunder, and agrees that in the event of default in any payment due thereunder, the undersigned will pay to Assignee, upon demand, the full amount remaining unpaid thereon, together with attorneys' fees of 15% of the amount then due if placed with an attorney for collection. The undersigned hereby waives notice of acceptance of this assignment and notice of default in any payment due under the within contract, and waives all setoffs and counterclaims against Assignee. This assignment shall become effective upon delivery of the within contract to Assignee or upon Assignee's payment of the purchase price therefor, whichever first occurs.

Date _____ 19__
Buyer
Buyer
Seller
Seller

TO: SECURITY NATIONAL BANK OF ROSWELL
ROSWELL, N.M.
(HEREIN CALLED ASSIGNEE)
FOR VALUE RECEIVED, each undersigned, for himself, his heirs, executors, administrators, successors and assigns, hereby sells and assigns to Assignee all the right, title and interest of the undersigned in and to the within contract and the property described therein. The undersigned represents that the within contract was executed by the Buyer therein named and that the property described therein was sold to said Buyer in accordance with the terms and conditions of said contract, and that all representations made by the undersigned in connection with the within contract are true and correct. The undersigned hereby guarantees the payment of the within contract and all sums due thereunder, and agrees that in the event of default in any payment due thereunder, the undersigned will pay to Assignee, upon demand, the full amount remaining unpaid thereon, together with attorneys' fees of 15% of the amount then due if placed with an attorney for collection. The undersigned hereby waives notice of acceptance of this assignment and notice of default in any payment due under the within contract, and waives all setoffs and counterclaims against Assignee. This assignment shall become effective upon delivery of the within contract to Assignee or upon Assignee's payment of the purchase price therefor, whichever first occurs.

Date _____ 19__
Seller
Seller

REPURCHASE AGREEMENT. If you repossess or recover the Property, we will upon your demand pay you the unpaid balance within thirty (30) days, provided this Property is tendered to us or our last address on other records within ninety (90) days after maturity of the earliest payment still unpaid, in default, of any of the notes and obligations and all premiums which become due and payable by you having been applied for this purpose on the earliest maturity date.

Signature of Dealer
By _____
Dealer